

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 239  
3059912

BETWEEN	ANDREA STEWART Applicant
AND	SCHOOLS OUT (GORE) LIMITED First Respondent
AND	LAURIE FERGUSON Second Respondent

Member of Authority:	Andrew Dallas
Representatives:	Applicant in person No appearance for the First and Second Respondents
Investigation Meeting	27 April 2022 in Gore
Date of the Determination	7 June 2022

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**SECOND DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In my first substantive determination<sup>1</sup>, I made a series of findings and awarded various remedies in favour of Andrea Stewart arising out of her employment relationship problem with Schools Out (Gore) Limited (Schools Out), where she was employed as childcare worker from February 2017 until February 2018.

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<sup>1</sup> *Stewart v Schools Out (Gore) Ltd* [2020] NZERA 421

[2] I reserved the question as to whether Ms Ferguson should be joined to Ms Stewart's proceedings under s 142Y of the Act as a person involved in minimum standards breaches, pending disposal by the Court of Appeal of a Labour Inspector's appeal against a judgment of the Employment Court about the requisite level of knowledge required for a respondent to be found to be a person involved. The Employment Court found "intent" was required.<sup>2</sup> The Authority had earlier found in the same matter that "wilful blindness" was sufficient.<sup>3</sup>

[3] In *A Labour Inspector v Southern Taxis Limited*<sup>4</sup>, the Court of Appeal found "[t]he level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer".<sup>5</sup> The matter was remitted back to the Employment Court for determination in light of the Court of Appeal's judgment.<sup>6</sup> A subsequent appeal to the Supreme Court by Southern Taxis was abandoned.<sup>7</sup> While the remitted matter before the court is yet to be disposed of, the test to be applied is now clear as a result of the Court of Appeal's judgment.

[4] Schools Out did not challenge the Authority's determination. Ms Stewart made various attempt to recover her remedies from Schools Out but to no avail.

## **Issue**

[5] The issue identified for investigation and determination is:

- (i) As sole director of School's Out, is Laurie Ferguson personally liable under s 142Y of the Employment Relations Act 2000 (the Act) for unpaid wages and holiday pay to Ms Stewart in the total amount of \$2,400?

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<sup>2</sup> *A Labour Inspector v Southern Taxis Limited* [2020] NZEmpC 63 at [187]

<sup>3</sup> *A Labour Inspector v Southern Taxis Limited* [2019] NZERA at [47]

<sup>4</sup> [2020] NZCA 337 (CA)

<sup>5</sup> At [57]

<sup>6</sup> At [60]

<sup>7</sup> SC19/2022, *Notice of Result of Application for Leave to Appeal against Decision in Civil Proceedings*, 14 March 2022

## **The Authority's investigation**

[6] Given the non-attendance by the Respondent at the first investigation meeting on 15 July 2020 and her general lack of engagement with the Authority otherwise, the Authority Officer was directed to organise process servers to personally serve on Ms Ferguson a copy of a Minute of the Authority, which set out the issue identified for investigation and determination, and the Notice of Investigation Meeting.

[7] Having reviewed the material provided to the Authority by the process servers, and held within its files, I am satisfied that Ms Ferguson was properly served with the relevant Authority material at 11.27am on 12 March 2022.

[8] The resumption of the investigation meeting occurred in Gore to maximise Ms Ferguson's participation; although other arrangements would and could have been made if Ms Ferguson had engaged with the Authority's processes. She did not. Nor did Ms Ferguson attend the investigation meeting.

[9] Ms Stewart attended with a support person and the meeting proceeding by way of obtaining further formal proof from her.

## **Authority's view of Ms Stewart's residual employment relationship problem**

[10] Under s 142Y of the Act, Ms Stewart, having been an employee of Schools Out, can recover wages and other moneys provided certain legislative prerequisites are met.

[11] The granting of "leave" to Ms Stewart to bring an action under s 142Y of the Act against Ms Ferguson has the practical effect of "joining" Ms Ferguson to the proceedings.

[12] Schools Out has made no attempt to comply with the Authority's determination<sup>8</sup> and Ms Stewart's attempts to recover her remedies underneath it has so far been unsuccessful. There is no direct evidence about Schools Out, about its ability to pay the remedies granted to Ms Stewart, particularly arrears wages and holiday pay, given the lack of engagement by Ms Ferguson with the Authority, other than to date, it has not done so. The company has now also been removed from the Companies Register.<sup>9</sup>

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<sup>8</sup> *Stewart v Schools Out (Gore) Ltd* [2020] NZERA 421

<sup>9</sup> See, by searching, <https://companies-register.companiesoffice.govt.nz/>

[13] I am satisfied, in these circumstances, on the balance of probabilities that Ms Stewart has a tenable cause of action against Ms Ferguson a director of Schools Out within the ambit of s 142W(3)(a) of the Act.<sup>10</sup> Leave is granted to Ms Stewart and Ms Ferguson is joined as second respondent to these proceedings under of s 221 of the Act, if not otherwise.

[14] Based on the evidence I heard from Ms Stewart during the investigation meeting on 15 July 2020 and 27 April 2022, the other information I received from Ms Stewart during these meetings and the lack of contradiction from Ms Ferguson, I am satisfied that a sustainable inference can be drawn that Ms Ferguson had the requisite knowledge of the essential facts of Schools Out contraventions of minimum employment standards – namely, the failure to pay wages and holiday pay to Ms Stewart.

[15] For completeness, as Ms Ferguson did not participate in the investigation meeting, she did not advance any defences, assuming any were available to her under the Act.

[16] To the extent that Schools Out is unable to pay Ms Stewart her unpaid wages and holiday pay<sup>11</sup>, which seems axiomatic now the company has been removed from the Companies Register, she seeks \$2,400 gross personally from Ms Ferguson. Ms Stewart is entitled to recover all unpaid wages, and not just minimum wages, because the definition of “employment standards” in s 5 of the Act includes “the provisions of the Wages Protection Act 1983” and s 4 of that Act requires an employer to pay the *entire amount* of a worker’s wages which become payable without deduction.

### **Summary of orders**

[17] Within 14 days of the date of this determination, Ms Ferguson must personally pay Ms Stewart the following amounts:

- a. unpaid wages in the amount of \$1,440.00 gross; and
- b. unpaid holiday pay in the amount of \$960.00 gross.

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<sup>10</sup> That is, Ms Ferguson was a person occupying the position of director of the company

<sup>11</sup> Employment Relations Act, s 142Y(2)(b)

## **Certificate of Determination**

[18] The Authority officer is directed to prepare a Certificate of Determination setting out the orders made in paragraph [17] above.

### **Costs**

[19] Costs are reserved. Ms Stewart was assisted in the preparation of the matter now before the Authority by the Southland Community Law and it may wish to apply for costs.<sup>12</sup> If Southland Community Law decides to do so, it will need to lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Ferguson would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Andrew Dallas  
Chief of the Employment Relations Authority

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<sup>12</sup> See, *Popkin v Innovative Landscapes (2015) Limited* [2020] NZERA 374